Supreme Court, U.S.
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No. 04-1209

IN THE

Supreme Court of the United States

MARTIN A. POLITZER, *Petitioner*,

v.

SALOMON SMITH BARNEY INC., *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Petitioner asserted state law consumer protection claims against Respondent Salomon Smith Barney ("SSB"). Rather than viewing the complaint in its entirety, SSB selectively focuses on certain allegations which it construes as transaction-based claims, while ignoring others which, fairly read, give sufficient notice of a range of non-transaction-based claims. These claims and supporting allegations are pertinent to evaluating the "in connection with" requirement of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227. Indeed, the Second Circuit has recognized that "fees" like those sought by Petitioner have no connection with the purchase and sale of securities, and are therefore not preempted. From this misconstruction of Petitioner's allegations, SSB proceeds to extract a number of necessarily flawed conclusions. First, it attempts to curtail consideration of the important federal questions raised in this Petition by asserting that both questions, which deal with the scope of SLUSA, were never raised in the proceedings below, which is not the case, as even a casual review of the record reveals. Next, SSB claims that the clearly conflicting decisions of the Courts of Appeals are in harmony with one another, a position that not even the Courts of Appeals themselves assert. SSB also fails to rebut that the decisions below impair state law remedies, and simply states that no impairment exists, in the face of the California Supreme Court's statement to the contrary. Accordingly, Petitioner respectfully requests that certiorari be granted.

I. The Important Questions Presented By This Petition Were Raised In The Proceedings Below And Are Properly Before This Court

SSB first seeks to foreclose review by asserting that questions raised in this Petition were not raised in prior proceedings and therefore are not open for review by this Court. (Resp. Br., 7) (citing *Ellis v. Dixon*, 349 U.S. 458, 460 (1955); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 459-60 (8th ed. 2002)). The questions presented in the Petition, however, which concern whether SLUSA preempts state law consumer protection claims, even when no purchases or sales of securities are alleged, were at the core of the proceedings below.

Petitioner asserted before the Court of Appeals that SLUSA's "in connection with" requirement was not satisfied because he did not allege the purchase and sale of securities. (App. Opening Br., 5, 14, 23-24.) Further, Petitioner stated that he "alleged only that [he] did not receive the type of information [he] contracted for, and that [SSB] promised to provide. Politzer's complaint . . . does not allege reliance, or the purchase or sale of a security. Consequently, Politzer's claims are properly brought under state law, and are not subject to SLUSA preemption." (*Id.* at 23.)

Indeed, the complaint is devoid of allegations concerning the purchase and sale of securities. As the district court stated, "Plaintiff here alleges that Defendant misrepresented the value of stock in order to

further the interests of its investment banking business. Plaintiff is careful to avoid alleging that the misrepresentations in Defendant's Research Products impacted Plaintiff's stock buying decisions." (App. 14a.)

SSB's contention that the above issues were not raised below is, therefore, without merit. Looking past this selective reading of the record, SSB's contention is that this Court may not review the conflicting interpretations given to SLUSA's "in connection with" requirement by the Courts of Appeals because the lower courts in this case did not consider that issue. That issue was not only raised, but was the determinative issue below. (App. 13a-14a.) The significance of the "in connection with" requirement is evidenced in SSB's Brief in Opposition. (Resp. Br., 3, 5-6, 8-10.)

SSB's claim that the second question presented, whether extending SLUSA to Petitioner's claims improperly forecloses his state law remedies, was never raised below is equally meritless. In seeking remand and opposing SSB's contention that SLUSA preempts those claims, Petitioner has consistently asserted that a finding of preemption would improperly foreclose his remedies under California law. Indeed, in the Court of Appeals, Petitioner sought reversal of the district court judgment asserting, in part, that preemption of his "state law claims for false advertising and consumer fraud against brokerage firms undermines the state's

sovereignty and police power, and leaves consumers without a remedy when brokerage firms falsely describe their research products as objective and independent, when they are tainted by undisclosed conflicts of interest . . . ." (App. Opening Br., 33.)

Further, SSB's contention that this issue was never raised is further belied by the fact that the Petitioner asserts claims under state consumer protection statutes, (*see, e.g.*, App. 6a), the existence of which was a prerequisite to SSB's removal. 15 U.S.C. § 77bb(f)(1)(A). In challenging the preemptive scope of SLUSA, Petitioner's pursuit of state law claims inherently raises the question of an improper foreclosure of state law remedies. As such, SSB's attempt to manufacture what has been described as "a defect [that] is normally fatal to the petition," ROBERT L. STERN, ET AL., *supra*, pp. 459-50, to eliminate the Court's discretion to grant review is illusory and should be disregarded by this Court in determining whether to grant this Petition.

II. Contrary to SSB's Assertions, The Complaint Does Not Allege Transactions In Connection With The Purchase And Sale of a Security

In attempting to downplay the conflict among the Courts of Appeals concerning SLUSA's "in connection with" requirement, SSB again ignores material allegations of the complaint. SSB argues that Petitioner seeks only commissions, and on that basis seeks to

justify the lower court decisions and suggests that the split among the Circuits does not exist. Petitioner sought, in part, restitution of "fees and commissions" to the putative class, but did not limit these to transaction-based sums. (Compl., 13.) As explained below, this incomplete and misleading interpretation of the complaint conceals the crucial finding by the courts below, the same point on which the Courts of Appeals are split, and which led to the lower courts' dismissals.

III. The Courts of Appeals Are Inconsistent In Their Interpretation Of SLUSA's "In Connection With" Requirement

SSB attempts to downplay the inter-Circuit conflict, in large part by taking advantage of the brevity of the Ninth Circuit opinion. The Court of Appeals, in affirming the findings of the district court and relying on the same precedent, however, demonstrates the state of the law in the Ninth Circuit. The district court construed SLUSA's scope expansively: "The 'in connection with' requirement is satisfied, if the buyer or seller of a security suffers an injury as a result of 'deceptive practices *touching*' on the purchase or sale of securities." (App. 14a) (emphasis added). The Court of Appeals approved and endorsed the district court opinion:

> The district court was also correct in dismissing the appellant's claims as preempted because SLUSA provides for the removal and dismissal of

> class actions brought pursuant to state law alleging misrepresentations in connection with the purchase or sale of a covered security. 15 U.S.C. § 77p(b)-(c); *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1128-29, 1131 (9th Cir. 2002); *Patenaude v. Equitable Life Assurance Soc'y of the U.S.*, 290 F.3d 1020, 1023-24 (9th Cir. 2002); *see also Feitelberg v. Merrill Lynch & Co.*, 353 F.3d 765 (9th Cir. 2003) (adopting the district court's opinion dismissing state-law claims as preempted by SLUSA).

(App. 2a-3a.)

Under prevailing Ninth Circuit law, alleged misrepresentations affecting the value of stock satisfy the "in connection with" requirement, regardless of whether there was a purchase or sale. *Feitelberg*, 353 F.3d at 765 (adopting *Feitelberg v. Merrill Lynch & Co., Inc.*, 234 F. Supp. 2d 1043 (N.D. Cal. 2002)). Specifically, misrepresentations of "the value of stock in order to further the interests of [defendant's] investment banking division" are subject to SLUSA preemption under *Feitelberg*. 353 F.3d at 765; 234 F. Supp. 2d at 1052. SSB omits any discussion of these authorities in its brief, perhaps to bolster its claim that the Ninth Circuit's position is undeveloped. The lack of precedential effect of the opinion in this case does not obliterate the binding precedents of the Ninth Circuit set

forth above. Thus, the fact that the Ninth Circuit's opinion in this case was unpublished is of no import.

The Ninth Circuit's view, however, is contradicted by the Second Circuit's construction of the "in connection with" language of SLUSA. The Second Circuit has held that although transaction-based commissions may "necessarily allege misstatements or omissions in connection with the purchase and sale of securities," the same does not hold true for non-transaction-based fees. *Dabit v. Merrill Lynch, Pierce, Fenner & Smith*, 395 F.3d 25, 49 (2d Cir. 2005). "An annual fee for services is paid whether or not the customer transacts on the account, and the misrepresentations inherent in the alleged nonperformance and statutory violations therefore do not necessarily 'coincide[] with' a securities transaction . . . ." *Id.* at 49-50 (citing *SEC v. Zandford*, 535 U.S. 813, 820 (2002); *Green v. Ameritrade, Inc.*, 279 F.3d 590, 598 (8th Cir. 2002); *Rowinski v. Salomon Smith Barney, Inc.*, No. 3:02CV2014, 2003 WL 22740976, at *3 n.5 (M.D. Pa. Nov. 20, 2003)). Therefore, under *Dabit*, claims seeking damages on non-transaction-based fees are not preempted by SLUSA, mandating remand.

Similarly, the Eighth Circuit has held that a plaintiff asserting state law misrepresentation claims "may even plead such a claim and escape SLUSA preemption, so long as his state-law claim does not require him to prove there was a sale or purchase of a covered security in

reliance on the misrepresentation." *Green v. Ameritrade, Inc.*, 279 F.3d at 599 (citing *Abada v. Charles Schwab & Co.*, 127 F. Supp. 2d 1101, 1103 (S.D. Cal. 2000)).

Finally, the Seventh Circuit has recently added to the growing discord among the Courts of Appeals. That court held that even "non-purchaser-non-seller" class actions fall within the ambit of SLUSA. *Kircher v. Putnam Funds Trust*, -- F.3d --, No. 04-1495, 2005 WL 757255, at *5 (7th Cir. Apr. 5, 2005). The *Kircher* court, in providing immense breadth to SLUSA, stated that "[b]y depicting their classes as containing entirely non-traders, plaintiffs do not take their claims outside § 10(b) and Rule 10b-5; instead they demonstrate only that the claims must be left to public enforcement." *Id.* at *4. SSB does not attempt to harmonize *Kircher,* which reads SLUSA even more expansively than the Ninth Circuit, with any other Court of Appeals decision. Its sole assertion is the claim that Petitioner may not assert "holder" claims. SSB cannot eliminate a clear split among the Circuits by ignoring an opinion, or portions of opinions. As even the *Kircher* court opined:

> Unfortunately, however, the other circuits do not agree among themselves (or with the SEC) what Rule 10b-5 itself means. The phrase "in connection with the purchase or sale" of a security is the sticking point.

Id. at *2.

The important questions presented in this Petition arise from that same "sticking point," over which the Courts of Appeals admit that they have been unable to agree. This very point has led to conflicting outcomes in cases involving SSB's investment research. *Compare Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 296, 304, 305 (3d Cir. 2005) (finding inclusion of preempted claims mandated dismissal of entire action) *and Norman v. Salomon Smith Barney, Inc.*, 350 F. Supp. 2d 382, 384, 387-88 (S.D.N.Y. 2004) (refusing to dismiss even though acts underlying state law claims "could also form the factual predicate for a securities fraud action . . . .").

IV. Preemption, Which By Definition Places Limits On State Remedies, Raises Inherent Federalism Concerns

Lastly, SSB urges that the lower court opinions do not implicate federal concerns, even though those opinions foreclose Californians' state law protections, as the California Supreme Court has recognized. *Small v. Fritz Companies, Inc.*, 30 Cal.4th 167, 171 (2003). It improperly invokes the label of "complete preemption," which has been applied to SLUSA, as a self-executing declaration of the scope of that statute. This term, however, is not "a crude measure of the *breadth* of the preemption (in the ordinary sense) of a state law by a federal law . . . ." *Schmeling v. Nordam*, 97 F.3d 1336,

1342 (10th Cir. 1996) (emphasis added). Indeed, the Courts of Appeals continue to struggle with defining SLUSA's boundaries, notwithstanding its "complete" preemptive effect. Equally irrelevant is SSB's characterization of the legal questions presented as "garden variety" interpretation of a statute. SSB's casual treatment of interpretation of the laws – a core function of the neutral and independent judiciary – does not obviate federalism concerns or justify the cavalier abrogation of the states' historic police powers. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981).

CONCLUSION

Petitioner therefore respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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